IN THE

Supreme Court of the United States

October Term, 1977

No. 77-1213

RAUL LLORENTE, ALVARO DORONZORO,

Petitioners,

against

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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Raul Llorente and Alvaro Doronzoro seek a writ of certiorari to review two orders of the Supreme Court of the State of New York, Appellate Division, First Judicial Department, entered April 19, 1977. 57 A.D.2d 526, 393 N.Y.S.2d 575. The Appellate Division unanimously reversed two judgments of the New York State Supreme Court, New York County (DAVIS, J.), rendered November 3, 1976. On one judgment Doronzoro was convicted, upon his plea of guilty, of POSSESSION OF A CONTROLLED SUBSTANCE [Cocaine] IN THE THIRD DEGREE (New York Penal Law §220.06). By the other judgment Llorente was convicted of

ATTEMPTED POSSESSION OF A CONTROLLED SUBSTANCE [Cocaine] IN THE THIRD DEGREE (New York Penal Law §§220.06, 110.00).* By those orders the Appellate Division also vacated the defendants' respective pleas, dismissed the respective counts of the indictments to which the defendants had pleaded guilty, re-instated the remaining counts of the indictment, and remanded the cases for further proceedings by the trial court.

Jurisdiction

Doronzoro and Llorente invoke the jurisdiction of this Court pursuant to 28 U.S.C. 1257 (3).

Constitutional Provisions and Statutes Involved

1. The Fourteenth Amendment to the United States Constitution provides in pertinent part:

> • • • nor shall any State deprive any person of life, liberty, or property, without due process of law. • • •

2. The Fifth Amendment to the United States Constitution provides in pertinent part:

> nor shall any person be subject for the same offense to be twice put in jeopardy of life of limb • • •

3. New York Criminal Procedure Law Section 220.30(1), (2), and (3)(a) provide:

> 1. A plea of guilty not embracing the entire indictment, entered pursuant to the provisions of subdivision four, five or six of section 220.10, is a "plea of guilty to part of the indictment."
>
> 2. The entry and acceptance of a plea of guilty to part of the indictment constitutes a disposition of the entire indictment.
>
> 3. (a) Except as provided in paragraph (b) a plea of guilty, whether to the entire indictment or to part of the indictment, may, with both the permission of the court and the consent of the people, be entered and accepted upon the condition that it constitutes a complete disposition of one or more other indictments against the defendant then pending. If the other indictment or indictments are pending in a different court or courts, they shall not be disposed of under this subdivision unless the other courts and the appropriate prosecutors also transmit their written permission and consent as provided in subdivision four of section 220.50; in such a case the court in which the plea is entered shall so notify the other courts which, upon such notice, shall dismiss the appropriate indictment pending therein.

4. New York Criminal Procedure Law Section 470.55(2) provides:

> Upon an appellate court order which reverses a judgment based upon a plea of guilty to an accusatory instrument or a part thereof, but which does not dismiss the entire accusatory instrument, the criminal action is, in the absence of express appellate court direction to the contrary, restored to its pre-pleading status and the accusatory instrument is deemed to contain all the counts and to charge all the offenses which it contained and charged at the time of the entry of the plea, except those dismissed upon appeals or upon some other post-judgment order. Where the plea of guilty was entered and accepted, pursuant to subdivision three

* Doronzoro was sentenced to a term of from five years to life imprisonment, and Llorente was sentenced to a term of from one year to life imprisonment.

of section 220.30, upon the condition that it constituted a complete disposition and dismissal not only of the accusatory instrument underlying the judgment reversed but also of one or more other accusatory instruments against the defendant then pending in the same court, the appellate court order of reversal completely restores such other accusatory instruments; and such as the case even where the order of reversal dismiss the entire accusatory instrument underlying the judgment reversed.

Statement of the Case; Prior Proceedings

On April 21, 1975, petitioner Doronzoro was charged in a twenty-one count indictment with drug sale, possession, and conspiracy charges occurring on different dates, including March 8, 1975. On April 1, 1975, petitioner Llorente was charged in a six count indictment with drug sale, possession, and conspiracy charges occurring on different dates, including March 8, 1975. A third co-defendant, Alfonso Velasco, who is not a party to this petition for certiorari, was charged on April 1, 1975 in a 16 count indictment with drug sales, possession, and conspiracy charges occurring on many different dates, including March 8, 1975.

Velasco and the two petitioners, Doronzoro and Llorente, all moved to suppress evidence seized on March 8, 1975 from two apartments, 2-F and 405, owned by Velasco. The motions of Doronzoro and Llorente were denied without a hearing on the basis that they lacked standing to contest the search. A hearing was held on Velasco's motion. His motion was granted in respect to the drugs seized from apartment 2-F and denied in respect to drugs seized from apartment 405.

On September 21, 1975 petitioners Doronzoro and Velasco pleaded guilty to the respective counts of their indictments which charged possession of drugs in apartment 2-F on March 8, 1975. These pleas, pursuant to New York Criminal Procedure Law Section 220.30 (1) and (2), were dispositions of the entire indictments. The petitioners were able, despite their guilty pleas, to appeal the denial of their motions to suppress New York Criminal Procedure Section 710.70.

On April 19, 1977 the Appellate Division of the New York State Supreme Court, First Department, held that the petitioners had standing to challenge the search of Apartment 2-F. It granted their motions to suppress. It also dismissed the counts of the respective indictments to which they had pleaded guilty, those counts charging possession of drugs in apartment 2-F on March 8, 1975. Acting under the mandate of New York Criminal Procedure Law Section 470.55(2) the Court re-instated the remaining counts of the indictments.* These counts charged possession of drugs unrelated to the illegal seizure.

The petitioners moved in the Appellate Division for re-argument on the basis that the remaining counts of the indictments should have been dismissed. Re-argument was denied on June 16, 1977. On December 1, 1977, leave to appeal to the New York Court of Appeals was denied by Judge Sol Wachtler.

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* Following re-instatement of these counts both petitioners pleaded guilty to other counts of the indictment and received the same sentences they had originally received.

POINT I

The New York State Appellate Division properly remanded petitioners' cases for reinstatement of the remaining counts of the indictments [answering petitioners' brief, Point I-III, pp. 12-15].

Petitioners were charged in separate indictments with numerous criminal acts committed on different dates. They each pleaded guilty to one count of their respective indictments. As permitted by New York State Law, the plea arrangement provided that the remaining counts of the indictments were covered by their guilty pleas. New York State Law also provided that the other counts could be reinstated if the petitioners' convictions were overturned on appeal. Petitioners' convictions were overturned on appeal and the appellate court ordered the reinstatement of the remaining counts.

Petitioners now argue that this Court should review the reinstatement of the remaining counts. Their entire present claim before this Court concerns the remedy ordered by the Appellate Division. Llorente and Doronzoro contend that the appellate court action was a result of vindictiveness by the district attorney and that prosecution of the other counts was barred by both an alleged plea bargain and double jeopardy. Petitioners' contentions concerning prosecutorial vindictiveness and a violation of the plea bargain are prematurely raised in this Court. They are wholly inappropriate for review. The only action presently before this Court is the order of the New York State Appellate Division remanding the case for reinstatement of the

remaining counts, not any action the prosecution may have subsequently taken in regard to those counts. Petitioners have also failed to create a record in state courts, either by affidavit or an evidentiary hearing, to substantiate their claim of a violated plea bargain. They rely solely on the minutes of the plea colloquy. An examination of that colloquy clearly demonstrates that there was no agreement concerning the potential reinstatement of other counts. All of petitioners' other substantive claims are without factual or legal basis.

A. Petitioners prematurely raise a claim that there was a plea bargain concerning the reinstatement of other counts if petitioners successfully appealed their convictions; as found by the state courts, there is no basis in the record to establish that such a plea bargain existed.

As noted *supra*, petitioners prematurely raise a claim that their reprosecution was barred by a plea bargain. If indeed such a bargain existed, it would be a defense to decision by the prosecution to proceed on those remanded counts, and could be raised on appeal from their convictions, if any, on those counts.* There can be no doubt, however, that the Appellate Division had the power to order the reinstatement of those counts, a procedure specifically mandated by New York Criminal Procedure Law Section 470.55 (see Subsection B, *infra*).

Moreover, upon examination, it is clear that there is no merit to petitioners' claim that there was a plea agreement

* Indeed, petitioners did plead guilty to other counts following reinstatement of the indictments. Thus, the points raised here should properly be raised on appeal from those convictions.

that the remaining counts would not be prosecuted if petitioners won appellate reversal of the counts to which they pleaded guilty. Indeed, petitioners attempt to create such a plea bargain out of thin air by repeatedly stating, in a conclusory fashion, that there was such an "express agreement." Petitioners did not submit affidavits to the state courts, or request an evidentiary hearing, to demonstrate the basis for their claims concerning the alleged plea bargain.* Rather, they rely solely on the statement of their own counsel at the plea colloquy that the pleas covered the remaining counts "with prejudice".

The state courts correctly interpreted the term "with prejudice" as an explanation that under New York Criminal Procedure Law Section 220.30(2) the plea constituted a disposition of the entire indictment. Indeed, in almost every plea bargain in New York the words "with prejudice" or "to cover" are employed to express the application of Section 220.30(2). However, another Section of the New York Criminal Procedure Law, Section 470.55, makes clear that upon appellate reversal of a guilty plea the other counts of an indictment are reinstated.

Petitioners now suggest that the prosecution waived its right to proceed in such reinstated counts. They do not reach this conclusion on the basis of a specific statement to that effect by the prosecution at the time of the plea or any other time. *Cf. Santobello* v. *New York,* 404 U.S. 257 (1971). Rather, they depend solely on the statement by

* Indeed, even such affidavits might be insufficient. *United States* v. *Mallah,* 503 F.2d 971, 988-89 (2nd Cir. 1974), *cert. denied,* 420 U.S. 995 (1975).

defense counsel at the plea that the other counts were covered "with prejudice". That statement had no bearing or relevance to the status of the other counts in the event of an appellate reversal. The state courts refused to make the absurd reading of the record urged by petitioners, and there is no basis for this Court to review those decisions.

B. The reinstatement of the remaining counts was not barred by double jeopardy.

Petitioners now argue that a plea of guilty to one count of an indictment, to cover the indictment, is the equivalent of an acquittal of the other counts and thus bars any possible prosecution of the other counts. Petitioners' Brief, Point II, p. 14. They thus argue that New York Criminal Procedure Law Section 470.55, which provides for reinstatement of such counts is unconstitutional. They cite only one case, *Green* v. *United States,* 355 U.S. 184 (1957), for this proposition. *Green* clearly has no relevance.

This Court has long held that a State may retry a defendant on a charge when the defendant has succeeded in having his first conviction on the charge set aside. The right against double jeopardy is not violated in such situations. At the defendant's request, "the original conviction has * * * been wholly nullified and the slate wiped clean." *North Carolina* v. *Pearce,* 395 U.S. 711 (1969); *see also Chaffin* v. *Stynchcombe,* 412 U.S. 17, 23-24 (1973); *Stroud* v. *United States,* 251 U.S. 15 (1919). The same principles apply where a defendant has succeeded in having his guilty plea set aside and the State seeks to prosecute on other charges that were originally covered as part of the plea agreement.

Since the only bar to the prosecution of those other charges was the plea agreement, and that agreement has been set aside at the defendants' request, the State is free to prosecute on the other counts.

In *Green* this Court held that a defendant had been placed in jeopardy on a first degree murder count when a jury remained silent on that count but convicted the defendant of second-degree murder. There had been an "implicit" acquittal and the defendant could not be retried on the first degree count. In contrast, in the instant case the petitioners were not acquitted or placed in jeopardy on the remaining counts of the indictments. Rather, as part of a plea agreement the prosecution had waived its right to proceed on those counts as long as the plea agreement remained in effect. At petitioners' urging the plea agreement did not remain in effect, and the appellate court remanded the cases for reinstatement of the remaining counts. No court has found that such action violates the principles of double jeopardy, and there is no need for this Court to review the decision below.

C. The reinstatement of the remaining counts was not a result of prosecutorial vindictiveness.

In their briefs to the Appellate Division petitioners made the same argument raised here concerning double jeopardy and an alleged plea bargain. In response we pointed out there was no agreement that the remaining counts would not be prosecuted in the event of an appellate reversal. We further cited New York statutory law which provided for the reinstatement of the remaining counts. We did not argue that the petitioners should be punished

for the undertaking of a successful appeal, but merely reminded the appellate court that a reversal would not bar reprosecution of the remaining counts.

Petitioners now argue that our action constituted the type of unconstitutional vindictiveness condemned in *Blackledge* v. *Perry*, 417 U.S. 711 (1969). This contention is without merit. First, as noted *supra*, petitioners raise this issue prematurely on this appeal. Any such unconstitutional vindictiveness by the prosecution would be a defense to convictions on the reinstated counts, not to reinstatement of the counts. Further, there was no vindictiveness whatsoever.

Blackledge concerned a situation where defendants received a greater sentence, with no apparent reason, for conviction of the same exact crime from which they had successfully appealed. Some Federal courts have considered applying this principle, in appropriate circumstances, to cases where prosecutors initiate totally new counts, which could have been brought originally, when a defendant's conviction on one count is reversed. However, the right of the prosecution to proceed on counts dismissed in light of a plea bargain has never been questioned as vindictive. Thus, the Ninth Circuit has reasoned:

> If, for example, a defendant pleaded guilty to one count and the prosecutor dismissed the others, it should be reasonably apparent that the dismissal was in consideration of the plea; if the defendant succeeded in withdrawing the plea, he should not be able to object to the prosecutor's reviving the other counts. *United States* v. *Gerard*, 491 F.2d 1300, 1306 (1974)

Indeed, although petitioners suggest the reinstatement of the other counts will make plea bargaining a "dangerous" and "useless" procedure, the Second Circuit has warned

against not permitting such reinstatement in an analogous situation:

> For us to hold that one in (the defendant's) position cannot be tried and sentenced upon the charge originally brought would encourage gamesmanship of the most offensive nature. Defendants would be rewarded for prevailing upon the prosecutor to accept a reduced charge and to recommend a lighter punishment in return for a guilty plea, when the defendant intended to attack it at some future date * * * This is nothing more than a "heads-I-win-tails-you-lose" gamble. To frustrate this strategy, prosecutors would be restrained from entering plea bargains. *United States ex rel. Williams* v. *McMann*, 436 F. 2d 103, 106-07 (2d Cir. 1970), *cert. denied*, 402 U.S. 914 (1971)*

There is no question of vindictiveness here, and petitioners have cited no precedent supporting their position. There is no basis for review by this Court.

Conclusion

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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April, 1978

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* In *McMann*, the defendant pleaded guilty to a lesser-included count, won reversal on appeal, and then objected to his prosecution, conviction, and greater sentence on the original greater offense.